Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Nationwide Programmatic Agreement Regarding	)	WT Docket No. 03-128
The Section 106 National Historic Preservation Act	)	
Review Process	)	

COMMENTS OF VERIZON WIRELESS

Dated: August 8, 2003

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Verizon Wireless hereby submits these comments in response to the Notice of Proposed Rulemaking ("NRPM") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding. In the NPRM, the Commission seeks comment on a draft Nationwide Programmatic Agreement ("draft NPA") among the FCC, the Advisory Council on Historic Preservation ("ACHP"), and the National Conference of State Historic Preservation Officers ("NCSHPO"). The draft NPA is designed to streamline procedures for review of certain antenna siting actions deemed "undertakings" by the FCC under the National Historic Preservation Act of 1966 ("NHPA").[1]

I. INTRODUCTION AND SUMMARY

Verizon Wireless participated as part of a telecommunications working group convened by the ACHP to develop the draft NPA. Several provisions of the draft NPA will benefit carriers, the historic preservation community, government agencies responsible for implementing the NHPA, and the public by streamlining certain aspects of the historic preservation review

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[1] 16 U.S.C. § 470 *et seq.*

process and by clearly defining parties' responsibilities in the area of historic preservation. These provisions are (1) the exclusions set forth in Section III of the draft NPA; (2) standardization of the definition of the area of potential effects ("APE") as set forth in Section VI.B. of the draft NPA; and (3) meaningful guidelines regarding how carriers may proceed when a state historic preservation officer ("SHPO") or tribal historic preservation officer ("THPO") does not issue an opinion within the required 30-day time period as set forth in Section VII.B and C.

Verizon Wireless is concerned that rather than properly balancing the public interest in promoting prompt deployment of new or improved wireless facilities and the goals of the NPA, the draft NPA proposes restrictions and processes that will frustrate tower siting without achieving the NPAs goals. In these comments, Verizon Wireless recommends changes to the draft NPA to eliminate these burdensome provisions.

II. THE NPRM FAILS TO ADDRESS WHICH SITING ACTIVITIES CONSTITUTE FEDERAL UNDERTAKINGS.

Section 106 of the NHPA requires the head of a Federal agency prior to the approval of the expenditure of any funds for a Federal or Federally assisted undertaking or prior to the issuance of any license, to take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency must afford the ACHP a reasonable opportunity to comment with regard to any such undertaking.[2] The NHPA defines "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including (A) those carried out by or on behalf of an agency; (B) those carried

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[2] Section 106 of the NHPA is codified at 16 U.S.C. § 470f.

out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.[3]

Thus, in order for the FCC to have any authority pursuant to the NHPA to require licensees to conduct historical impact reviews, the activities in question must be Federal undertakings. The NPRM, however, fails to address this fundamental issue. Rather, it appears to presume – without any analysis – that antenna siting is an "undertaking." That is incorrect. Clearly only specific actions can constitute undertakings; those that are not are not subject to the NHPA at all.

The FCC similarly ignored this issue in adopting the Programmatic Agreement on Collocation. As a result, on May 2, 2001, Sprint PCS filed a Petition for Reconsideration ("Sprint Petition") of that decision , and requested the FCC to rule that the siting of towers and antennas is not a Federal undertaking and therefore not subject to the NHPA. Sprint argued that since the FCC is not involved in tower and antenna siting activities and has, at best, minimal control over such decisions, Section 106 does not apply.[4] On May 14, 2001, Verizon Wireless filed comments in support of the Sprint Petition.[5] Verizon Wireless agreed with Sprint that the NHPA does not apply to tower and antenna siting activity. Verizon Wireless argued that even though the FCC has general licensing authority, the NHPA does not apply to all activities taken

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3 16 U.S.C. § 470w(7).

4 Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, DA 00-2907, Sprint PCS Petition for Reconsideration and Clarification (filed May 2, 2001), at 1-6.

5 Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, DA 00-2907, Comments of Verizon Wireless (filed May 14, 2001) ("Verizon Wireless Comments").

pursuant to that authority, particularly where there is little or no FCC involvement in the siting decisions.[6] Verizon Wireless argued in the alternative that even if some tower and antenna siting activities are deemed to be Federal undertakings, the NHPA does not apply to every aspect of tower or antenna siting.[7] The FCC has never put the Sprint Petition or the Verizon Comments on Public Notice.

In the draft NPA, the Commission attaches a long "illustrative" list of activities that the Commission declares to be Federal undertakings.[8] Thus, apparently without considering the arguments made by Sprint and Verizon Wireless in 2001, the Commission has summarily decided that virtually every aspect of antenna and tower siting is a Federal undertaking.[9]

The FCC should not apply this NPA or any rules or agreements implementing Section 106 of the NHPA to any tower or antenna siting activities without first considering the Federal undertakings issues raised by Sprint PCS and Verizon Wireless. Absent a ruling on the Sprint Petition, the FCC has not determined what antenna siting activities, if any, are rightfully considered Federal undertakings. While the FCC has attempted to give some guidance in this proceeding by attaching its illustrative list, that list is clearly not a decision on the merits.[10]

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6 *Id.*, at 2-7.

7 *Id.*, at 7-8 (for example, Verizon Wireless argued that the placement or addition of equipment at the base of a tower is so far removed from the siting process that it cannot be considered a federal undertaking).

8 Draft NPA, Section I.B, at A-4 and Attachment 2.

9 The draft NPA does find that maintenance and servicing of towers are not Federal undertakings. *Id.*, Section I.B, at A-4.

10 Indeed, Section I.B of the draft NPA states that nothing in the agreement precludes persons from challenging any prior determination of what does or does not constitute an undertaking. *Id.*

Thus, if an applicant disagrees with the presumption made in the NPA that the NHPA applies to virtually every antenna siting activity, to challenge that presumption the applicant must disregard the NPA, and then wait for a final FCC decision finding it in violation of FCC rules before it can appeal the decision. To avoid this untenable situation, the Commission should act immediately to put the Sprint Petition on Public Notice, seek comment on the issues raised therein, and then issue a ruling.

III. VERIZON WIRELESS SUPPORTS THE EXCLUSIONS PROPOSED IN THE DRAFT NPA BUT BELIEVES THAT SOME MODIFICATIONS ARE NECESSARY.

As stated above, adopting meaningful exclusions for activities not likely to have an adverse affect on historic properties is one of the most significant benefits that can come from the draft NPA. These exclusions benefit carriers by allowing them to avoid the often costly and time-consuming Section 106 review process. SHPOs/THPOs and the FCC also benefit by not having to expend resources to review matters not likely to have an adverse effect on historic properties.

For this reason, Verizon Wireless supports the effort in the draft NPA to adopt exclusions from the Section 106 process. Of the exclusions proposed, the first three, dealing with modifications, replacement towers, and temporary towers are particularly warranted because such activities present little or no risk of adverse effects. Verizon Wireless urges the Commission to adopt these exclusions and resist any recommendations to limit their application.

The other exclusions, however, are either so narrowly drawn or convoluted that they will provide at best limited streamlining value. For example, Exclusion 4, dealing with construction of towers on industrial/commercial/governmental property, requires applicants to inventory structures in the vicinity and determine their age as well as determine if any grounds to be

excavated have been "previously disturbed."[11] Attempting to make these determinations, however, is likely to prove so burdensome to applicants that many will opt to submit proposals for review rather than trying to determine if the exclusion applies.

Exclusion 5, dealing with towers to be located within 200 feet of utility or communication tower right-of-ways, interstate highways, or passenger railway lines, suffers from similar problems. In order for an applicant to determine if this exclusion applies, it must first determine (1) if the highway or railway line is included in the National Register of Historic Places (and has setting or other visual elements as a character-defining feature of eligibility); (2) if the proposed facility will be located within 200 feet of any other structure that is over 45 years old; and (3) if the proposed facility is with ¾ mile of and visible from a unit of the National Park System that is listed or eligible for listing in the National Register or is a National Historic Landmark.[12] Again, the amount of research required to determine if this exclusion applies will likely lead many applicants to ignore the exclusion.[13]

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[11] Draft NPA, Section III.A.4, at A-9. The draft NPA defines "previously disturbed" as being previously excavated to a depth of two feet or six inches deeper than the general depth of the anticipated disturbance (whichever is greater). Draft NPA, Section VI.C, at A-18.

[12] *Id.,* Section III.A.5, at A-9.

[13] Verizon Wireless opposes the opt-out proposal for Exclusion 5 suggested by NCSHPO for the reasons stated by CTIA. *See id,* note 5, at A-9.

To better ensure that Exclusions 4 and 5 will have their intended benefits, the Commission should amend the exclusions to remove the preconditions that must be met for the exclusions to apply.[14]

IV. THE FCC SHOULD NOT ADOPT SECTION III.B OF THE DRAFT NPA.

In response to concerns expressed by some Indian tribe representatives, the Commission seeks comment on a proposal, contained in Section III.B, to require an applicant, prior to application of Exclusions 1, 2, 4 and 6, to notify any Indian tribe with aboriginal or historical associations in the area that the undertaking may adversely affect properties in the area. If the tribe indicates that such an adverse affect may occur, the applicant must submit the project to the full Section 106 review process. The entities supporting this language argue that this language is required under Section 101(d)(6)(B) of the NHPA. This section requires that, "[i]n carrying out its responsibilities under Section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian Organization ("NHO") that attaches religious and cultural significance to [Historic Properties]."[15]

Verizon Wireless opposes this proposal on policy and legal grounds. From a policy perspective the proposal would defeat the purpose of the exclusions. If carriers must identify tribes that may have interest in the project, notify the tribes, and wait for a tribal response before an exclusion applies, the benefit of the exclusion will be lost. For this reason, Section III.B should not be adopted.

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[14] While Verizon Wireless does not believe Exclusion 6 – applying to areas designated by SHPOs as having little potential to affect historic properties -- requires any modification, it is not aware of any current situations where this exclusion would apply.

[15] Draft NPA, Section III.B, at A-10.

From a legal perspective, Verizon Wireless agrees with CTIA, PCIA, NAB, the ACHP and NCSHPO that the concerns expressed by the Navajo Nation in proposing this language merely raise issues concerning providing tribes adequate notice to participate in the Section 106 review process, and do not prevent Indian tribes from consulting on undertakings that may affect properties on ancestral Indian lands.[16] As discussed below, Section IV of the draft NPA ensures that Indian tribes and NHOs may consult on proposed undertakings as required under Section 101(d)(6)(B) of the NHPA. Nothing in the draft NPA prevents any Indian tribe from consulting on proposed undertakings, even where an exclusion applies. Indeed, Section XI of the draft NPA specifically provides that entities may bring matters to the FCC's attention and begin a consultation even if an exclusion applies.[17] Given these protections already afforded to Indian tribes, there is no valid basis to impose special advance notice requirements as Section III.B proposes.

V. THE COMMISSION SHOULD ADOPT ALTERNATIVE A FOR INDIAN TRIBE AND NATIVE HAWAIIAN ORGANIZATION CONSULTION, BUT SOME MODIFICATIONS ARE NECESSARY.

Verizon Wireless understands that Section IV of the draft NPA is necessary to make sure that Indian tribes and NHOs are given the opportunity to consult on proposed undertakings in accordance with Section 101(d)(6)(B) of the NHPA. Verizon Wireless regularly seeks to consult with tribes and NHOs that have an ancestral interest in the area where the siting activity will occur. As a result, Verizon Wireless supports most of the language in Section IV, Alternative A in the draft NPA.

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16 *Id.*, at A-10.

17 *Id.*, Section XI, at A-26.

Verizon Wireless has concerns, however, with the language in Section IV.F of the draft NPA, which states that applicants are to allow tribes and NHOs a reasonable opportunity to respond to communication from applicants inviting tribal or NHO participation. The draft NPA states that while 30 days is generally considered a reasonable opportunity, applicants should allow additional time as reasonable under the circumstances upon request.[18] Verizon Wireless opposes this language first, because it provides parties inadequate guidance as to how to treat requests for additional time and how much additional time must be granted. This language could lead to the types of indefinite siting delays that the draft NPA was designed to eliminate.

The NPA should not, in any event, require applicants to wait more than 30 days for responses from any consulting party. While the ACHP rules are silent on timeframes for tribes or NHOs to respond to invitations to consult,[19] the ACHP rules set 30 days as a reasonable period of time for SHPOs/THPOs to respond to a request to review an undertaking.[20] If 30 days is a reasonable time for tribes to review a proposed project and issue an affect opinion, it should likewise be sufficient for tribes and NHOs to respond to a request to participate in the Section 106 review process. For this reason, Section IV.F. should be revised to state that 30 days is a reasonable time for applicants to give to tribes and NHOs to respond to invitations to participate.

Verizon Wireless opposes Section IV, Alternative B. This alternative, which was not discussed in the context of the working group that initially developed the draft NPA, establishes government-to-government consultation as the norm for reviewing projects that may affect

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18 *Id.*, Section IV.F, Alternative A, at A-12.

19 *See* 36 C.F.R. § 800.3(f)(2).

20 36 C.F.R. § 800.3(c)(4).

historic properties of cultural or religious significance to a particular tribe or NHO. The only way such consultations can be avoided is for the applicant to obtain a letter of certification from the tribe or NHO stating that government-to-government consultation is not necessary.[21]

While government-to-government consultation is a right tribes and NHOs may insist on under the NHPA, in Verizon Wireless' experience many tribes and NHOs either do not elect to participate in the Section 106 review process or are willing to work directly with applicants. Where tribes or NHOs insist upon government-to-government consultations, Verizon Wireless has found that the consultation takes much more time, thus delaying the siting process. Verizon Wireless is concerned that since many tribes and NHOs do not respond to letters from applicants, it will be very difficult to get tribes and NHOs to sign certification letters. As a result, government-to-government consultations will become much more prevalent, and adopting Alternative B would impose more delays to antenna siting activities and be antithetical to the purposes of the NPA. For this reason, Alternative B should not be adopted.

VI. THE NPA SHOULD NOT DICTATE THE TIMING OF NOTIFICATIONS TO GOVERNMENT ENTITIES.

Section V.A of the draft NPA elaborates on the public notice requirements contained in the ACHP rules by requiring applicants to submit documentation to the local government agency with land use jurisdiction prior to requesting SHPO/THPO review.[22]

Verizon Wireless objects to the language requiring applicants to notify parties in a particular order. This provision constitutes regulatory micromanagement with no conceivable

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[21] Draft NPA, Section IV, Alternative B, at A-14-15.

[22] *Id.*, Section V.A, at A-15.

rationale. Verizon Wireless often prefers to seek and obtain SHPO/THPO approval prior to seeking local zoning approval.[23] In other cases, particularly when the siting activity is a collocation on an existing building or structure, there is no need to seek zoning approval. Applicants should be free to determine on particular projects whether it makes sense to seek SHPO/THPO approval before notifying government land-use agencies.[24] The draft NPA should not deprive carriers of the ability to determine the order in which they seek the necessary approvals.

VII. VERIZON WIRELESS SUPPORTS THE IDENTIFICATION, EVALUATION AND ASSESSMENT OF EFFECTS SECTION AND THE PROCEDURES SECTION.

Two of the most beneficial draft NPA provisions are the provisions adopting a standardized area of potential effects ("APE"), and clarifying how applicants may proceed when SHPOs/THPOs do not respond in 30 days. The APE provision, as well as provisions setting forth the scope of SHPO/THPO review, is contained in the Identification, Evaluation and Assessment of Effects Section. The APE provision strikes an appropriate balance between setting reasonable boundaries for the identification and review process and allowing exceptions for instances where a visual effect may be possible beyond the boundaries established in the draft NPA. The other provisons in this Section will benefit applicants and the preservation community

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[23] In some cases, particularly where zoning approval may be difficult, applicants may want to be reasonably sure they can obtain all other necessary approvals before going through the zoning process.

[24] Applicants understand that they are required to notify the entities listed in Section 800.3 of the ACHP rules. Applicants also understand that they bear the risk that if a party is not notified until after SHPO/THPO review occurs, the applicants run the risk that they may need to re-initiate SHPO/THPO reviews to consider the views of parties not invited to participate initially.

alike by setting clear parameters for SHPO/THPO review and diminishing the potential for SHPOs/THPOs to stray from the Section 106/ACHP rule review criteria.

Verizon Wireless also supports the Procedures Section of the draft NPA. This Section is necessary to clarify the process applicants must follow when SHPOs/THPOs do not respond within the 30-day time period established in the ACHP rules.

Neither of these Sections, however, establishes time expectations for FCC decisions. In the Identification, Evaluation and Assessment of Effects Section, for example, parties may seek resolution from the FCC should they fail to agree on the use of an alternative APE.[25] Similarly, the Procedures section provides for the FCC to resolve differences between the parties pertaining to whether the proposed facility will have an adverse effect or how to mitigate such effects.[26] These provisions, however, do not place any time constraints on the FCC to make these determinations. Given that time is both critical and costly in antenna siting activities, the Commission must be willing to commit to making these determinations quickly. Indeed, Verizon Wireless sees no reason why the FCC should take any more time to make determinations than the ACHP rules allow for SHPO/THPO determinations. Accordingly, the FCC should commit in the NPA to make all of its determinations within 30 days after the matter is submitted to the FCC for determination.

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[25] Draft NPA, Section VI.B.2.c, at A-18.

[26] *Id.*, Sections VII.B.4, VII.C.4, VII.D.5, at A-21- A-23.

VIII. SECTION VII.A.4 OF THE PROCEDURES SECTION SHOULD BE AMENDED TO MAKE CLEAR THAT PARTIES CAN RESUBMIT FOR SHPO APPROVAL AT ANY TIME AND TO PROVIDE FOR FCC RESOLUTION OF DISPUTES OVER THE ADEQUACY OF THE SUBMISSION PACKET.

Section VII.A.4 of the draft NPA states, in the context of an applicant's submission packet being deemed inadequate, that the applicant may resubmit an amended submission packet "any time within 60 days following its receipt of the returned Submission Packet."[27] Verizon Wireless does not understand why a time limit needs to be placed on the resubmission. Perhaps this Section is designed to allow the applicant to resubmit the packet and restart the clock for SHPO/THPO review at the point in the 30-day review period that the SHPO/THPO informed the applicant of the problem. If that is the intention of the language, it should be clarified.

The language, however, can be read to prevent an applicant from resubmitting a proposed site for SHPO/THPO review ever again if the applicant submitted the project for review previously, was deemed to have submitted inadequate documentation, and did not resubmit with proper documentation within 60 days. There is no support for such a provision in ACHP rules and Verizon Wireless doubts the FCC intends for "jeopardy" to attach to submissions with inadequate documentation. Accordingly, the FCC should amend the language in this Section to remove the possibility that the language will be interpreted in this manner.

Section VII.A.4 is also unacceptable because it purports to give SHPOs/THPOs absolute authority to determine whether the documentation submitted is adequate. Applicants should have express recourse to the FCC if they believe a SHPO/THPO unreasonably determined that the submission packet was inadequate.

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[27] *Id.*, Section VII.A.4, at A-20.

IX. CONCLUSION

Several provisions of the draft NPA will benefit carriers, the historic preservation community, government agencies responsible for implementing the NHPA, and the public by streamlining certain aspects of the historic preservation review process or by clearly defining parties' responsibilities in the area of historic preservation. However, the draft NPA contains some proposals which, if adopted, would make historic preservation review more difficult and time consuming. As discussed above, the NPA ultimately adopted should retain all of the beneficial provisions and eliminate those proposals that would create additional antenna and tower siting barriers.

Respectfully submitted,

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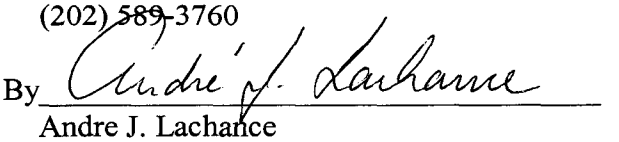
By 

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Dated: August 8, 2003